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Supreme Court, U.S.
FILED

No. 02Q21621 MAY 2 2003

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In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE),
Respondent.

On Appeal to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI
APPENDIX - VOLUME
Nos. 4 - 7

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APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff / Appellant, USCA No. 02-2117

vs.

SPENCER ABRAHAM, in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY,
Defendant /Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
CIVIL NUMBER 01- 0399 JP/LCS

REPLY BRIEF OF PLAINTIFF / APPELLANT

ORAL ARGUMENT IS REQUESTED

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Appellant served his Opening Brief on 6/03/02 (henceforth "O-Brief ") Appellee served a Response Brief on 7/23/02 (henceforth"Response"). Appellee addressed five issues in the Response. Appellant will reply to each.

ARGUMENT

A. CLAIMS ARISING UNDER TITLE VII.

1. Harassing Calls

All of what Appellee claims in the Response for this issue is irrelevant to this instant appeal due to what had occurred in the district court discovery process. Appellee has failed to respond to what was pointed out within Appellant's Opening Brief, First Issue at 12-14. The Magistrate found that the telephone area codes and prefixes for Request for Production No. 4 (henceforth "Request No. 4") "are relevant" to

Appellant's opposition to summary judgment. Defendant IS withholding "facts essential" to Appellant's opposition. See Celotex, 477 U.S. at 326. "These facts certify that Appellee's motion for summary judgment [doc. nos. 35, 36] was indeed a "premature" motion, . . ." O-Brief at 13

To claim the Request No. 4 would be of "no value", Defendant states that Appellant "did not request any logs reflecting calls made to his unlisted number." See Response at 12. **This claim of Appellee is bogus and inapposite.** The last harassment telephone call that Appellant had listed within his "Exhibit Harass" (doc. 43 at 7) was on 8/13/99. On this day [8/13/99] of the last harassment call, Appellant changed his phone number to an unlisted number in his attempt to stop the harassment calls. The argument of Appellee makes no sense.

Next, Appellee attempts to claim that there is no "inference that the calls were made for retaliatory reasons under Title VII . . . because he engaged in activities protected by Title VII." See Response at 12 Appellee is wrong. Appellant had been providing testimony and initiating various legal proceedings against Appellee concerning "safety and environmental law violations". This was stated within Appellant's Equal Employment Opportunity ("EEO") Complaint ("EEO-V") that was filed. See doc. 43 at 6. The harassment calls which Appellant had received were in close temporal relations to the proceedings with which he was involved in alleged retaliation of harassment and intimidation. The Supreme Court has ruled that under Title VII "former employees . . . may sue . . . for . . . retaliatory post-employment actions." See Robinson, 519 U.S. at 337.

The argument that Appellee makes concerning Fed.R.Civ.P 56(f),that summary judgment was appropriate because Appellant did not file a Rule 56(f) affidavit [for Request No. 4] has no foundation and fails. Appellant did not need to file such an affidavit, because the Magistrate had ruled that Appellant's Request No. 4 documents "are relevant to his claims" in granting the discovery request. See doc. 55 at 2. Appellant had been denied "relevant" discovery ruled by the Magistrate which invokes the ruling of the Supreme Court that "allows a summary judgment motion to be denied, . . . , if the nonmoving party has not had an opportunity to make full discovery." See Celotex, 477 U.S. at 326.

The district court judge had granted the motion for summary judgment, during the Oral Argument on **3/19/02**, PRIOR to when the ruling on Appellant's Motion to Compel discovery was ruled upon by the Magistrate. See doc. 55 filed on **3/20/02**. Appellant had thoroughly explained the need for discovery concerning Request No. 4 within doc. 31 at 3, 4; and doc. 39 at 4, 5. The evidence within Request No. 4 has been suppressed by the district court judge, and that violates Due Process. See Brady, 373 U.S. at 86-88.

Appellee makes a **knowingly false representation** concerning Request No. 4 by stating: **"the logs submitted to the court only reflect calls made after April 1999, many months after the alleged harassing phone calls were made to his home."** See Response at 12 The last harassment call reported by Appellant occurred on **8/13/99**.

There were 16 harassment calls reported by Appellant from May through August 1999 within "Exhibit Harass". See doc. 43 at 7 Appellant requests that this Court impose sanctions upon Appellee for these bogus and false representations made above "to deter repetition of such conduct." See Fed.R.Civ.P. 11(c)(2).

2. Blacklisting

Appellee attempts to claim that Appellant's specific allegations of blacklisting at CEMRC and FLETC are addressed by three self-serving very general denial affidavits of Hunter, Inlow, and O'Dowd. Appelleeis wrong. Appellee's witnesses above are required to be impeached due to their demonstrated conflicting testimony, bias, and false representations towards Appellant as thoroughly outlined within doc. 60.

Conflicting testimony impeaches Appellee's witnesses above. See Michigan, 494 U.S. at 348-354; Oregon, 420 U.S. at 720-724; Harris, 410 U.S. at 226; and Walder, 347 U.S. at 64. Also, admitted "bias" is a "Permissible and established basis of impeachment of a witness." See United States v. Abel, 469 U.S. at 50. Additionally, Fed.R.Civ.P. 609(a) allows impeachment of witnesses for "false statement[s]". See Mincey, 437 U.S. at 398; New Jersey, 440 U.S. at 459. Appellant's doc. 60 clearly demonstrates all of the above concerning Appellee's witnesses.

Since Appellee's EEO Office refused to investigate the specific allegations of blacklisting at CEMRC and FLETC (doc. 38 at 2-5), with Appellee's witnesses and affidavits above impeached, Appellee admits to the blacklisting of Appellant. Doc. 60 is far from being "MOOT" as as the district court claims. See doc. 62.

In addition, concerning **CEMRC [partially funded by Appellee]**, Appellee's witness details that Appellant "was not a finalist for any position." Does this explain why Mr. Jeremy Staley, who had no college degree or relevant experience, was hired for the job "Computer Technician-II" which Appellant had also applied for ? Appellant has a Master of Science degree and over six years of experience directly related to the CEMRC job. Appellee failed to touch upon any of these circumstances above concerning CEMRC for obvious reasons.

B. CLAIMS ARISING UNDER THE ENVIRONMENTAL STATUTES.

Appellee claims that the district court did not have jurisdiction of Appellant's claims under the environmental statutes, and that due to this "dismissal was proper." Response at 17 Appellee is wrong. Appellee repeats the same previous claim that complaints concerning the environmental statutes involved with this case can only be made to the U.S. Department of Labor ("DOL"). Appellee again refuses to address the claim of Appellant. See doc. 38 at 7, 8.

The employee protection provisions [15 U.S.C. § 2622(a); 42 U.S.C. § 9610(a); 42 U.S.C. § 300 j-9(i)] of the environmental statutes do not eliminate applicable law concerning disabled persons [29 C.F.R.§ 1614.302] for filing a "mixed" complaint with Appellee's EEO Office. A general principle of statutory construction is outlined within 29 C.F.R. § 1630.1(a)(2) [Relationship to other laws], this section states:

> "This part does not invalidate or limit the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection of the rights of individuals with disabilities than are afforded by this part."

The same is true for the environmental statutes above. E.g.: those statutes do not "invalidate or limit the remedies . . . of individuals with disabilities" such as Appellant.

A "mixed" EEO complaint "may contain . . . allegations that the Merit Systems Protection Board (MSPB) has jurisdiction to address." See 29 C.F.R. § 1614.302. An MSPB regulation describes their jurisdiction as including taking complaints which "evidences a violation of law . . . or substantial and specific danger to public health" such as the environmental statues above. Appellee fails to explain how or why the general rule of statutory construction quoted above does NOT apply to the environmental statutes noted above. The district court had proper jurisdiction over Appellant's "mixed" EEO Complaint.

C. CLAIM REGARDING APPELLANT'S EEO COMPLAINT.

During the processing of Appellant's EEO Complaint by Appellee, Appellant had alleged the improper dismissal of a portion of the Complaint with knowingly false representations. Appellee had refused to investigate the legitimate allegations of "retaliation" which "are considered to be complaints of discrimination . . ." See 29 C.F.R. § 1614.103(a). Appellant made the allegations of EEO law within doc.38 at 1, 2.

E.g.: the "letter dated 2/21/00" which described the alleged violations. **Appellee failed to deny these allegations of EEO law violations, within the 2/21/00 letter**, which rise substantially higher than mere poor processing of a complaint such as untimeliness. The Supreme Court has ruled that:

> "Indeed, this Court has already settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." See Davis, 442 U.S. at 242.

Appellee has admitted, as described above, to refusing to afford Appellant the "equal protection" of EEO law, and **have violated Appellant's Fifth Amendment constitutional right.** This is contrary to the claim of Appellee that this issue concerns only mere poor processing of Appellant's EEO Complaint.

D. CONSTITUTIONAL CLAIMS.

The ruling Appellee cites, Brown v. GSA, 425 U.S. 820 (1976), coincides with 42 U.S.C. § 1981a(a)(1) which states:

> "A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice . . ."

However, as Appellant has pointed out several times, the Solid Waste Disposal Act ("SWDA") applies to Appellee in this case. Appellee has not denied that all of the requirements of the SWDA apply including 42 U.S.C. § 6961(a). Section 6961(a) "waives any immunity otherwise applicable to" Appellee. See doc. 38 at 9; and O-Brief at 21-23. The district court ignored all of the above.

The Supreme Court has ruled that when the immunity of a federal entity has been waived, **an aggrieved federal employee may sue with a "constitutional tort claim"** such as Appellant's claim (emphasis added). See Federal Deposit Insurance Corp., 510 U.S. at 472. Therefore, the ruling held in Johnson, 421 U.S. at 459 applies to this instant appeal that Title VII does NOT preempt Constitutional claims. The three 10th Circuit cases which Appellee cites [to support the claim, that for Appellant, Title VII is the exclusive remedy] are inapposite because none of those cases involve the waiver of the SWDA's § 6961(a).

E. THREE MOTIONS FOR PARTIAL JUDGMENT

1. First Motion.

As described above within doc. 40, Appellant had given Judicial Notice of Adjudicative Facts. Appellant based three admitted facts within doc. 47 upon what was found in the Federal Register. It was explained within doc. 43 at 3 that: "As 44 U.S.C. § 1507 requires: "The contents of the Federal Register shall be judicially noticed . . ."" Appellee has failed to deny any of this and has therefore admitted to pretext, the destruction of evidence of a blacklisting nature about Appellant,

and posting blacklisting information about Appellant over the Internet from 2/98 thru present. See doc. 47

2. Second Motion.

Appellee claims that the failure to file a "Response" [Brief in Opposition] to Appellant's Petition for Writ of Certiorari (henceforth "Petition 01-1143") in the U.S. Supreme Court does not amount to any "admissions". See Response at 14. Appellee is wrong. Doc. 50 at 2, 3 thoroughly explains that Appellee HAD taken the position, concerning Petition 01-1143, that the right to controvert any of the facts or law within said Petition was waived. See Sup.Ct. Rule 15(2).

The Supreme Court has ruled that: "where a party assumes a certain position in a legal proceeding, . . . , he may not thereafter, . . . , assume a contrary position." See Davis, 156 U.S. at 689. Henceforth, Appellee is NOT now free, within this instant proceeding, to controvert any of the facts or law within Petition 01-1143 that are detailed within doc. 50. Appellee is collaterally estopped from doing so. Appellee has admitted to the 14 violations outlined within doc. 50. This is fact and well beyond dispute. What is detailed above is fact and law and far from being "bizarre" as Appellee claims. See Response at 13.

3. Third Motion.

Appellant's third motion explains that the first two motions were titled incorrectly as Motions for Partial Summary Judgement. The first motion was actually a Motion for Judgment on the Pleadings, and the second motion was actually a Motion for Judgment as a Matter of Law. Doc. 60 at 1 [Memo]. This third Motion for Judgment as a Matter of Law was not responded to at all by

either the district court or Appellee.

It is detailed within this motion, with admitted facts, how three of Appellee's witnesses [Hunter, Inlow, & O'Dowd] have offered conflicting testimony, demonstrated bias, and made false representations concerning Appellant. doc. 60 at 2-5 These actions of Appellee's witnesses warrants impeachment of their testimonies regarding Appellant.

The district court denied the three motions above of Appellant [doc. nos. 47, 50, 60] totaling 19 admissions of fact of Appellee concerning violations towards Appellant. The only reason given by the district court for the denial of the three motions, containing admitted facts, was that the motions were somehow "MOOT". **The district court abused its discretion by refusing to admit evidence of admitted facts** within doc. nos. 47, 50, and 60. See Beech Aircraft Corp., 478 U.S. at 172. It is also an abuse of discretion when a motion is denied without a legitimate explanation. See Rose, 2000 Fed. App. 0053P; See also Jackson, 788 F.2d at 1089.

Appellee makes a claim that all three of the motions above were untimely by stating: **"This Court should also affirm the district court's decision because Rockefeller's motions were untimely."** See Response at 24. As explained to Appellee above, the First Motion [doc. nos. 46, 47] was a Motion for Judgment on the Pleadings. This motion can be served: "After the pleadings are closed but within such time as not to delay the trial, . . ." See Fed.R.Civ.P. 12(c). The Second and Third Motions were Motions for Judgment as a Matter of Law, which: "may be made at any time before submission of the case to the jury." See

Fed.R.Civ.P. 50(a)(2). It is alleged that Appellee's statement that: **"Rockefeller's motions were untimely"**, is **another knowingly false representation** in Appellee's attempt to mislead this Court.

F. DUE PROCESS VIOLATIONS

Within Appellee's Response section about harassment telephone calls, the admissions of fact within two motions which Appellant had filed [doc. nos. 47 & 50] are denied. Appellee claims that the admitted facts within doc. 47 are based upon Appellant's Request for Admissions [doc. 40]. Appellee fails to note the relevant portion of doc. 40. Doc. 40 is both a Request for Admissions and Judicial Notice of Adjudicative Facts.

Appellee claims that the Request for Admissions was untimely. Appellee is wrong. Appellant had prepared a Request for Admissions to follow doc. 20, long before the expiration of discovery, but the district court judge had ruled doc. 20 as **"premature"** and denied the motion. The district court did rule that Appellant's doc. 20 evidence could be resubmitted at an "appropriate" time such as in response to a "Motion". See doc. 23.

Appellant had resubmitted his evidence, along with doc. 38, to address a motion as the district court ordered that Appellant could do. Along with his evidence, Appellant had to request [doc. 40] that Appellee admit to the authenticity of his evidence. Appellant knew that he had to do his best to authenticate his evidence. This was so because the district court was likely to dispel Appellant's evidence if he did not do so as had

been done by this district court in Flor, 93-1342.

In the process of denying doc. 20, however, the district court violated Appellant's Fifth Amendment Due Process rights. This is so because the district court's Order [doc. 23], on 10/11/01, came the very NEXT DAY after Appellee's Response filed on 10/10/01 [doc. 22]. Appellant was denied his Reply to doc. 22 before judgment was made [doc. 23] as D.N.M.LR-Civ. 7.6(a) requires. See doc. 25 at 3 filed on 10/23/01. Appellant alleges that all of this was done for the purpose of **suppressing the incriminating evidence** that Appellant was attempting to introduce into the record of the case [01-399 JP/LCS]. These actions by Appellee and the district court violate Appellant's Fifth Amendment Due Process rights. See U.S. v. Classic; U.S. v. Price; Scheuer; Walker; and Williams. The district court is supposed to be forbidden to violate Appellant's Due Process rights. See Davis, 442 U.S. at 234.

G. JUDICIAL INTEGRITY.

The Sup.Ct. has repeatedly emphasized the imperative of judicial integrity, especially with regard to the Constitution. For example:

> ". . . it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of the courts, ... Why otherwise does it direct the judges to take an oath to support it ? This oath certainly applies in an especial manner to their conduct in their official character. How immoral

> to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support ! "

See Marbury, 5 U.S. at 180. The district court judge has violated the oath that he had sworn to support the Constitution, and he had certainly "knowingly" done so. Also:

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives injury. One of the first duties of government is to afford that protection." Id at 163.

Justice Brandeis (dissenting) expounded upon the imperative of judicial integrity:

> "In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example. Crime is contagious. If Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

See Olmstead, 277 U.S. at 485. In Elkins, 364 U.S. at 222, 223, the Sup.Ct. repeats the imperative of Justice Brandeis above concerning judicial integrity, and again in Mapp, 367 U.S. at 659. The Sup.Ct. also states that:

> "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." See Id.

Appellee and the district court have done both: failure to observe the laws of the United States [SWDA], AND "disregard of the" Constitution. See Petition 01-1143 at 1 thru 7, A-13 thru A-15, A-45, A-46. The Sup.Ct. has emphasized that the lack of judicial integrity not only imperils our Government, but in addition, that there is also:

> **"danger to public welfare" from "wrongful judicial conduct."**

Pennekamp, 328 U.S. at 346. See also Bivens, 403 U.S. at 389; Carlson, 446 U.S. 14; and Ludwig, 427 U.S. at 625, 626.

CONCLUSION

For the above cited reasons, Appellant prays that this Court reverse the district court's grant of summary judgement, and remand the case back to Trial Court as a Matter of Law. See Anderson, 477 U.S. at 252.

Dated: August 9th, 2002

Respectfully submitted,
s/Tod N. Rockefeller
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APPENDIX 5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

THIRD MOTION FOR
PARTIAL JUDGMENT AS A MATTER OF LAW

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Third Motion for Partial Judgment as a Matter of Law filed herein.

Dated: March 18th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF
THIRD MOTION FOR PARTIAL JUDGMENT
AS A MATTER OF LAW

I. BACKGROUND

1. Plaintiff filed two motions previous to this instant motion which were titled incorrectly. Plaintiff apologizes to the Court for any inconvenience. The first motion was titled: Motion for Partial Summary Judgment, served on 3/1/02 (henceforth "1st Motion"). Plaintiff's 1st Motion was actually a Motion for Judgment on the Pleadings which was filed "after the pleadings" were "closed". See Fed.R.Civ.P. 12(c). This was also explained within the 1st Motion at 1.

2. Plaintiff's next motion was titled: Second Motion for Summary Judgment, served on 3/11/02 (henceforth "2nd Motion"). Plaintiff's 2nd Motion was actually a Motion for Judgment as a Matter of Law. See Fed.R.Civ.P. 50(a)(2). This was explained

within the 2nd Motion at 7. Facts had arisen within Plaintiff's Petition within the Supreme Court of the United States (henceforth "SCt.") after the 1st Motion was filed, which prompted and justified filing of Plaintiff's 2nd Motion.

3. So far, Plaintiff has clearly outlined a total of 17 admissions made by Defendant of blacklisting and retaliations taken by Defendant against Plaintiff. This instant Motion (henceforth "3rd Motion") adds two additional admissions of blacklisting by Defendant.

II. IMPEACHMENT OF THE TESTIMONIES OF DEFENDANT'S WITNESSES

4. Black's Law Dictionary, 7th ed., defines "impeachment" as follows:

> "Impeachment. 2. The act of discrediting a witness, as by catching the witness in a lie **or** by demonstrating that the witness has been convicted of a federal crime."

The definition in Black's above coincides with the Fed.R.Civ.P. and rulings made by the Supreme Court as will be detailed below.

5. There are three methodologies, applicable to this case, for impeaching the testimonies which Defendant has filed.

6. First, the SCt. decided that voluntary evidence obtained can "be used to impeach the Defendant's conflicting testimony." See *Michigan v. Harvey*, 494 U.S. 344 (1990); See also *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971); *Walder v.United States*,

347 U.S. 62, 64 (1954). Defendant's witnesses have offered conflicting testimony as will be detailed below.

7. The second method for the impeachment of the testimonies of Defendant's witnesses is concerning their demonstrated and admitted "bias" towards Plaintiff. The SCt. has ruled that although "the Rules do not by their terms deal with impeachment for "bias," . . . "We think . . . that it is permissible to impeach a witness by showing his bias under the Federal Rules of Evidence just as it was permissible to do so before their adoption." See *United States v. Abel*, 469 U.S. 45, 49, 51 (1984). The bias of Defendant's witnesses towards Plaintiff will be demonstrated below.

8. Lastly, the Fed.R.Evid. 609(a) allows impeachment of witnesses for "crimes", "dishonesty", and a "false statement." It has been admitted by Defendant that Defendant's three witnesses Ron O'Dowd, Earl Hunter, and Rush Inlow have each previously made knowingly false representations towards Plaintiff. These witnesses of Defendant above have committed criminal felony violations by making a "false statement in a Government matter." See the False Statements Accountability Act of 1996 [Public Law 104-292]. These facts will be detailed below.

9. Fed.R.Evid. 609(a)(2) **requires** that evidence of such a violation above [Public Law 104-292] **"shall be admitted if it involved dishonesty or false statement, . . ."** to impeach the testimonies of Defendant's witnesses (emphasis added).

III. DEFENDANT'S FALSE REPRESENTATIONS IN A GOVERNMENT MATTER

10. The following admissions of Defendant were

voluntary. Therefore, the reliable, probative, and inculpatory evidence obtained by Plaintiff from Defendant can be used for impeachment purposes. See *New Jersey v. Portash*, 440 U.S. 450, 459 (1979); *Mincey v. Arizona*, 437 U.S. 385, 398 (1978).

11. False Representation of Ron O'Dowd: "In fact, AOO has informed us that Appellant [Plaintiff] has already engaged in extreme verbal harassment of co-workers . . . see Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19th, 1997)."

12. Plaintiff made an averment that this statement was knowingly false within ¶¶ 20, 21 of his Original captioned Complaint above. Defendant has failed to deny this specific averment and has therefore admitted to it. See Fed.R.Civ.P. 8(d).

13. False Representation of Earl Hunter: this is detailed within "Averment No.8" of Plaintiff's 2nd Motion. Plaintiff will summarize below the false representation which Defendant has admitted to. Mr. Hunter claimed that there was no requirement to issue an employee a Performance Improvement Plan ("PIP") before or after an employee receives failing performance ratings.

14. Plaintiff's 2nd Motion referenced above specifically details that an applicable employee performance management program of Defendant DOES require the issue of a PIP after an employee receives failing ratings. Mr. Hunter made this false representation in his attempt at escaping from a demonstration of pretext for issuing Plaintiff a PIP that was five months late (emphasis added).

15. False Representations of Rush Inlow: Mr. Inlow was Defendant's removing official who decided that Plaintiff should be removed from federal service for putative "poor performance."

Plaintiff clearly demonstrated three different instances of pretext for his removal. The evidence which Plaintiff submitted to Inlow made no difference.

16. The three demonstrations of pretext within Plaintiff's 2nd Motion (Averments 1, 8, & 9),that have now been admitted to by Defendant, also prove Inlow's false representations that Plaintiff was a "poor performer."

17. The three demonstrations of pretext for Plaintiff's removal are: (1) Plaintiff's receiving failing performance ratings 2 ½ months after his expert report identifying Defendant's unsafe RH-72B nuclear waste shipping cask. (2) Plaintiff's removal six weeks prior to Defendant's Record of Decision ("ROD") for "Safe Shipping Containers" which contained the unsafe RH-72B container which Plaintiff had reported. (3) Plaintiff was issued a PIP, described within ¶ 14 above, which was five months late, but only two days after Defendant was contacted by Plaintiff's Equal Employment Opportunity ("EEO") Complaint Counselor.

IV. CONFLICTING TESTIMONIES AND DEMONSTRATED BIAS

18. All three of Defendant's witnesses above have claimed that Plaintiff harasses co-workers, is a "poor performer", threatens the physical safety of co-workers, and various other admitted bogus claims in retaliation for Plaintiff's reporting of safety issues.

19. Defendant has admitted that all of the claims above concerning Plaintiff are false. This clearly demonstrates bias towards Plaintiff by O'Dowd, Hunter, and Inlow.

20. Plaintiff has demonstrated bias towards him by Defendant's witnesses as described above. Defendant has admitted to this. The Supreme Court ("SCt."), however, has required that "the existence of . . . bias" towards a party only be "more probable" by averments made [not proven or admitted to] to warrant impeachment of the opposing party's witness testimony. See *United States v. Abel*, 469 U.S. at 52.

21. Plaintiff, as described above, has exceeded the SCt.'s ruling concerning the application of bias to implement impeachment of Defendant's witness testimonies.

22. Defendant's witnesses had all claimed not to have engaged in retaliations against Plaintiff for his reporting of safety issues, which has now been admitted to be false. Defendant's witnesses [O'Dowd, Hunter, & Inlow] have engaged in retaliations, including blacklisting, against Plaintiff.

23. For this instant Complaint, Defendant's witnesses now offer conflicting testimony that they have not engaged in retaliations, such as blacklisting, against Plaintiff, as they have admitted to have done above.

V. CONCLUSION

24. All of the above [per Fed.R.Evid. 609(a)(2)] requires that the testimonies of Defendant's witnesses, concerned with the alleged blacklisting of Plaintiff at the Carlsbad Environmental Monitoring and Research Center ("CEMRC") and the Federal Law Enforcement Training Center ("FLETC"), be impeached.

25. Since Defendant refused to investigate and properly respond to Plaintiff's specific and factual

averments of blacklisting at CEMRC and FLETC, other than the very general testimonies described above which are required to be impeached, Defendant has failed to deny these averments of Plaintiff.

26. Defendant has admitted to blacklisting Plaintiff at CEMRC and FLETC. See Fed.R.Civ.P.8(d).

27. Defendant, as described above, has had the chance to be fully heard on the claims of Plaintiff. Defendant has admitted to the averments above which detail that Defendant HAS engaged in blacklisting and severe retaliations against Plaintiff. This is in addition to the blacklisting outlined in Plaintiff's 1st and 2nd Motions.

28. The evidence in this case in Plaintiff's favor "is so one-sided that" Plaintiff "must prevail as a matter of law." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

Defendant was contacted and Plaintiff has been unable to determine his position on this Motion.

Prayer for Relief

Defendant has no evidentiary basis for a reasonable jury to find for him on his blacklisting and retaliations towards Plaintiff, which has been admitted to. Plaintiff, therefore,demands a judgment as a matter of law granting this instant motion, with also a jury trial for the determination of damages.

Dated: March 18th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
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(505) 628 - 3541

APPENDIX 6

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,
Plaintiff,

v.

SPENCER ABRAHAM , in his
official capacity as SECRETARY,
UNITED STATES DEPARTMENT
OF ENERGY (DOE),
Defendant.

Civ. No.
01-399
JP/LCS

SECOND MOTION FOR
PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Second Motion for Partial Summary Judgment filed herein.

Dated: March 11th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
Carlsbad, NM 88220
(505) 628 - 3541

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST, WIPP SITE TEAM, CARLSBAD AREA OFFICE, U. S. DOE,
Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),
Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

1. Plaintiff filed two complaints (99-1059 PK/KBM & 00-0652 PK/KBM) within the United States District Court for the District of New Mexico (henceforth "USDC-NM"). These complaints were concerning Plaintiff's removal from federal service on 12/10/97 and other retaliations taken against him by the same Defendant captioned above.
2. The USDC-NM dismissed the two previous complaints, described above, with an Order filed on 12/19/00 (doc 64).
3. Plaintiff filed two appeals of the dismissal of his Complaints above with the United States Court of Appeals for the Tenth Circuit (henceforth "10th Cir."). These appeals were docketed by the

10th Cir. as Nos. 00-2480 & 01-2054.

4. Plaintiff's 10th Cir. appeals above were dismissed with an Order and Judgment filed on 11/15/01.

5. Plaintiff filed a timely Petition for Writ of Certiorari (henceforth "Petition") with the Supreme Court of the United States (henceforth "SCt.") concerning the 10th Cir.'s dismissal of 00-2480 & 01-2054. Plaintiff's Petition was docketed as No. 01-1143.

6. On 2/19/02, Defendant filed a waiver of the right to file a Brief in Opposition (henceforth"**BiO**") to Petition 01-1143 with the SCt..

II. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

7. The adjudicative facts which Plaintiff wishes to be judicially noticed reside within his SCt. Petition described above.

8. This Petition meets the requirements of Fed.R.Evid. 201(b) in that these facts are "not subject to dispute" due to Defendant's filing of the waiver so as not to file a BiO. In addition, the Petition is most certainly "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned [the Supreme Court of the United States (Sct.)].

9. In further addition: "The most frequent use of judicial notice of ascertainable facts is in noticing the contents of court records." Charles Allan Wright & Kenneth W. Graham Jr., Federal Practice and Procedure: Evidence sec. 5106, at 505 (1st ed. 1977 & supp. 1997).

10. Defendant was served with all of this information (99-1059 PK/KBM & 00-0652 PK/KBM) well **over a year ago** and has a full

opportunity to respond.

III. REQUIREMENTS SIGNIFICANT TO DEFENDANT'S ADMISSIONS TO MATERIAL ALLEGATIONS

11. The SCt. pleading which Plaintiff filed is his Petition. Defendant's avenue for a responseto Plaintiff's averments within the Petition was a BiO. Defendant failed to file a BiO as described above.

12. A SCt. BiO is controlled by this Court's Rule 15 which requires that:

> ". . . the brief in opposition should address any perceived misstatement of fact or law that bears on what issues would be before the Court if certiorari was granted."
>
> Also: "Any objection to consideration of a question presented . . . , may be deemed waived unless called to the Court's attention in the brief in opposition."

13. Within his Petition, Plaintiff made thirteen averments where each "bears on" the "issues" "before the Court". Black's Law Dictionary, 7th ed., defines "averment" and "allegation" as follows:

> "**Averment** - A positive **declaration of fact**; esp., an assertion or allegation in a pleading."
>
> "**Allegation** - 1. The act of declaring something to be true. **2. Something declared or asserted as a matter of fact, esp. in a legal proceeding; a party's formal statement of a factual matter as being true or provable,**

without its having yet been proved."

14. The SCt. requirements concerning a BiO, within that Court's Rule 15 quoted above, is the equivalent of **Fed.R.Civ.P 8(d) Effect of Failure to Deny**. Rule 8(d) requires that:

> "Averments in a pleading to which a responsive pleading is required, . . ., are admitted when not denied in the responsive pleading."

III. DEFENDANT'S ADMISSIONS TO MATERIAL ALLEGATIONS

15. Averment No.1:

> **"When Petitioner [Plaintiff] began identifying safety deficiencies, . . ., the DOE engaged in reprisals towards Petitioner.** The retaliations against Petitioner culminated in his removal from federal service on 12/10/97 for putative "poor performance"."

See Petition at 1 E.g.: Failing annual performance appraisal after Plaintiff's reporting of the unsafe RH-72B nuclear waste shipping cask. See Petition at 2, A-37.

16. Averment No.2: **Plaintiff identified a design failure of Defendant's RH-72B nuclear waste shipping cask resulting in a faulty Radioactive Containment Seal**. Plaintiff requested, through discovery [Request No. 10], documents related to the approval of the safety report of the RH-72B cask. "Defendant DOE claimed that: ". . . the information has nothing to do with the issues in this case." See doc. 48 at 3"

Plaintiff replied that: **"This assertion of Defendant is obviously bogus."** Also: **"This evidence has been improperly suppressed . . ."** See Petition at 2. See also Averment No.8.

17. Averment No.3: **Relevant admissible evidence actually submitted [558 pages] by Plaintiff was improperly excluded.** See Petition at 3 & A-27 thru A-30.

18. Averment No.4: The DOE has failed to controvert the facts detailed within A-31 thru A-46. See Petition at 4. See also Averment Nos. 8 thru13.

19. Averment No.5: **Plaintiff identified flawed air monitoring** of radionuclide aerosols **and inadequate** underground repository **fire protection controls** at Defendant's Waste Isolation Pilot Plant ("WIPP").

20. Averment No.6: **Retaliations from Defendant towards Plaintiff that are in very close temporal relation to Plaintiff's whistleblowing**, described partially above, included two failing annual performance appraisals and two transfers. See Petition at 5

21. Averment No.7: Defendant claimed that the exclusive remedy for federal employee whistleblowers is the Civil Service Reform Act ("CSRA"). Plaintiff clearly demonstrated that this is NOT so. See Petition at 6.

22. Averment No.8: **Defendant has made knowingly false representations.** For example, Defendant claimed: ". . ., there is no requirement that a **PIP** [Performance Improvement Plan] be issued before or after an employee gets a failing rating." Plaintiff replied that: "This representation is knowingly false (emphasis added) See Exhibit ADA-17." The "Exhibit ADA-17" was the DOE Albuquerque Operations Office ("AOO")

Performance Management and Awards Programs (dated 3/26/96 and current at the time). This AOO Program, described above, required the following: "8. Performance Based Actions. The final rating of record may be used to take necessary action **when an individual's performance is rated as "fail" . . . , the following course(s) of action will be taken: Issuance of PIP." Plaintiff's PIP was five months late, and two days after contact of Defendant by Plaintiff's Equal Employment Opportunity ("EEO") Counselor**. See Petition at A-35. This demonstrates pretext.

23. Averment No.9: Plaintiff's identification of the unsafe RH-72B shipping cask, his removal on 12/10/97, and Defendant's issue of their "Safe Shipping Containers" Record of Decision ("ROD") on 1/23/98 are all related. **Both Defendant's issue of a PIP to Plaintiff above, and the issue of their ROD establish causation for Plaintiff's removal from federal service and for his being blacklisted.** See Petition at A-36.

24. Averment No.10: **Defendant refused to investigate Plaintiff's Fourth EEO Complaint which is a violation of 29 C.F.R. Part 1614.102(c)(5).** See Petition at A-39.

25. Averment No.11: Plaintiff makes a specific allegation of being blacklisted at the Carlsbad Environmental Monitoring and Research Center ("CEMRC"). **Defendant fails to rebut this specific allegation and admits to blacklisting of Plaintiff.** See Petition at A-42.

26. Averment No.12: **False representations are made by Defendant's representative O'Dowd** to a United States Department of Labor ("DOL") Administrative Law Judge ("ALJ") that Plaintiff had made only "mere oral comments" to an agent of the

United States Environmental Protection Agency ("EPA"). Defendant admits that Plaintiff made written comments, NOT "mere oral comments", to the EPA. **This represents O'Dowd's guilt in conducting retaliations against Plaintiff to get his DOL Complaint dismissed.** See Petition at A-43.

27. Averment No.13: **Defendant violates Title VII [42 U.S.C. § 2000e-3]** with the unlawful dismissal of a portion of Plaintiff's Fifth EEO Complaint and the attempted restraint of Plaintiff's effort to file the complaint. These actions are also violations of 29 C.F.R. Part 1614 Sections 105(g) and 107. See Petition at A-44.

28. Averment No.14: Plaintiff is protected under the Americans with Disabilities Act ("ADA"). Defendant made an unreasonable request for a medical history from Plaintiff's doctor in violation of the ADA to intimidate Plaintiff's medical provider. This intimidation is also a form of blacklisting in regard to Plaintiff's ability to obtain services from his medical providers. See Petition at A-45 & A-46.

V. CONCLUSION

29. Defendant, as described above, has had the chance to be fully heard on the claims of Plaintiff. Defendant has admitted to all of the fourteen averments above which detail that Defendant HAS engaged in blacklisting and severe retaliations against Plaintiff. This is in addition to the blacklisting outlined in Plaintiff's first Motion for Partial Summary Judgmentserved on 3/1/02.

Defendant was contacted and noted that this motion is opposed.

Prayer for Relief

Defendant has no evidentiary basis for a reasonable jury to find for him on his blacklisting and retaliations towards Plaintiff, which has been admitted to. Plaintiff, therefore,demands a judgment as a matter of law granting this instant motion, with also a jury trial for the determination of damages.

Dated: March 11th, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
319 Sunnyview St.
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(505) 628 - 3541

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MOTION FOR PARTIAL SUMMARY JUDGMENT

COMES NOW Plaintiff Rockefeller and moves this Court for the issuance of an Order granting this instant Motion. Facts supporting the guilt of Defendant within this Motion are set forth in Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment filed herein.

Dated: March 1st, 2002

Respectfully submitted,
s/Tod N. Rockefeller, *pro se*
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRON. SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
U. S. DOE,

Plaintiff,

v.

SPENCER ABRAHAM , in his official capacity as SECRETARY, UNITED STATES DEPARTMENT OF ENERGY (DOE),

Defendant.

Civ. No. 01-399 JP/LCS

MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

I. BACKGROUND

a. Within this instant Motion, there are NO new facts or averments which have not been fully briefed as of this day. Fact Nos. 1 through 3 below have been firmly established within the record of this case with impeccable evidence (from within the Federal Register). Due to what Plaintiff had experienced with his prior complaint (99-1059 PK/KBM), Plaintiff knew that it was necessary to establish facts and have all of his aversions fully briefed before attempting this Motion. For example, Plaintiff had specifically explained what is detailed within **Fact No. 1** below (**Unsafe Shipping Cask, Model RH-72B**), and had attempted to include **Defendant's Record of Decision ("ROD") concerning "Safe Shipping Containers"** for Transportation of Nuclear Waste as supporting

evidence of Defendant's pretext for Plaintiff's removal from federal service for his putative "poor performance" (doc. 58 at 5). The previous Court had improperly excluded Defendant's ROD, with a total of 748 pages of Plaintiff's evidence, as inadmissible. Plaintiff found this to be a shocking and blatant violation of his Fifth Amendment right of Due Process (**emphasis added**). This is why Plaintiff had attempted to establish his self-authenticated evidence into the record of this case with his Motion for such filed 9/26/01 (doc.20) (henceforth "First Evidence Motion").

b. On 2/2/02 Plaintiff served a Request for Admissions of the Authenticity of Evidence and Judicial Notice of Adjudicative Facts (henceforth "Notice") for evidence within Plaintiff's Binder of Self-Authenticated Evidence (henceforth "Binder"). As described within the Notice,two exhibits beneath Tabs 6 and 10 of the Binder ("Exhibit CX-18" and "Exhibit Destruct") are noted within the Federal Register and are required to be judicially noticed. See Notice at 3 and 44 U.S.C. § 1507. Fact Nos. 1 through 3 below are established from Exhibits CX-18 and Destruct.

II. ESTABLISHED ADJUDICATIVE FACTS

a. Fact No. 1: Pretext is clearly demonstrated by Exhibit CX-18 (Defendant's ROD described above) beyond any shadow of a doubt as to the reason why Plaintiff was removed from federal service on 12/10/97. As described within Plaintiff's First Evidence Motion at 4 the following is noted:

"15.Tab 6: "Exhibit CX-18" - this is a

1/23/98 Record of Decision ("ROD") made by Defendant of **Safe** "Transportation of Transuranic Waste to the Waste Isolation Pilot Plant" ("WIPP"). Plaintiff was removed from federal service only several weeks prior to Defendant's ROD. Plaintiff had reported a **design failure** of one of the two nuclear waste shipping casks (Model RH-72B), within this ROD, which results in a **faulty Radioactive Containment Seal** of the cask. This is evidence of why Plaintiff had to be fired so that Defendant could announce their ROD. Again, here is strong evidence which establishes a *prima facie* case of Plaintiff's against Defendant."

Causation is clearly established between Plaintiff's removal on 12/10/97 and Defendant's ROD issued on 1/23/98 with only six weeks between the two actions. **Compare** *Ramirez v. Oklahoma Dept. of Mental Health*, 41 F.3d 584, 596 (10th Cir. 1994) (one and one-half month period between protected activity and adverse action by itself, establish causation) **with** *Richmond v. ONEOK, Inc.*, 120 F.3d 205, 209 (10th Cir. 1997) (three month period, standing alone, is insufficient to establish causation). This averment of pretext was made by Plaintiff for the first time back within his prior suit (99-1059 PK/KBM, doc 58 at 5) on 10/17/00, again within his First Evidence Motion on 9/26/01 as described above, and yet **again** for the third time within Plaintiff's Reply to Defendant's Response to Plaintiff's Motion to Compel at 3, 4 served on 2/2/02. On **three occasions** now

Defendant has refused to respond to this averment and its impeccable factual evidence. Fed.R.Civ.P. 8(d) requires that: "Averments in a pleading to which a response is required, . . ., are admitted when not denied in the responsive pleading." This Fact No. 1now solidly establishes that Defendant HAS conducted severe retaliations against Plaintiff for his objecting to Defendant's disregard for worker and public safety. The foundation or *prima facie* case is formed here for Defendant's initial and continuing retaliations against Plaintiff.

In addition, Defendant also makes knowingly false representations concerning this averment. Defendant claimed that: "Plaintiff fails, however, to explain how the correspondence concerning the shipping casks . . . is even remotely related to the claims in this suit . . ." See Response to Plaintiff's Motion to Compel at 4, 5 filed on 1/24/02. It is detailed above how Plaintiff did NOT (**on three occasions**) "fail" to "explain" how "the correspondence concerning the shipping casks" is very "related to the claims in this suit." This establishes Defendant's guilt even substantially further.

b. Fact No. 2: Defendant has admitted within Exhibit Destruct to the **destruction of "discoverable" evidence of a blacklisting nature** about Plaintiff prior to his 3/98 hearing with the Merit Systems Protection Board ("MSPB"). This averment of Plaintiff is related to a Freedom of Information Act ("FOIA") request which he made concerning Defendant's alleged complaints from "coworkers" where Plaintiff was told by Defendant on 7/6/97 that he was somehow "threatening their personal safety". Of primary importance to

this case, is that a court and jury are entitled to presume that when a party destroys evidence prior to litigation, that the evidence would be unfavorable to that party. See *Akiona v. U.S.*, 938 F.2d 158 (C.A.9 (Hawaii) 1991); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (C.A.7 (Ill) 1987); *Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874 (C.A.Fed. (Ind.) 1986); *Coates v. Johnson & Johnson*, 756 F.2d 524 (C.A.7 (Ill.) 1985).

To escape from supplying Plaintiff with this requested evidence, Defendant made several knowingly false claims within the Response to Plaintiff's First Request for the Production of Documents dated 12/28/01 (henceforth "12/01 Response"). Defendant made the clearly bogus claim that: ". . .it is unclear what documents Plaintiff is seeking." See 12/01 Response at 1 Plaintiff thoroughly dispelled Defendant's claim above within the Motion to Compel's Memorandum at 1, 2 served on 1/7/02. In Defendant's Response to Plaintiff's Motion to Compel (henceforth "1/02 Response") filed on 1/24/02, additional knowingly false representations are made. Defendant claims that Plaintiff is "precluded from obtaining the documents through discovery." See 1/02 Response at 3, 4. This representation is false. Defendant's attorney O'Dowd admitted that these documents are discoverable. Exhibit Destruct at document 26 (Record of Conversation dated 11/19/97) notes: "O'Dowd believes these two memos would be discoverable under 5 CFR 1201 in their entirety, . . ." This is why O'Dowd later requested that this evidence be destroyed. See Binder Tab 10, Exhibit Destruct - doc 30 dated 12/31/97.

Defendant makes one knowingly false claim after another to avoid supplying Plaintiff with

incriminating evidence, while failing to address the aversion made by Plaintiff that the claim within the "two memos" is false. Fed.R.Civ.P 8(d) **again** requires that Defendant has admitted to Plaintiff's averment by failing to deny it. In addition, **Defendant changes his accusation** from Plaintiff "threatening the personal safety" of "coworkers" to stating that Plaintiff ". . . is not threatening physical harm, but is verbally harassing people . . .". See Binder Tab 10, Exhibit Destruct - doc 26 dated 11/19/97. Defendant has admitted to making false representations about Plaintiff of a blacklisting nature. It is therefore **fact** that Defendant HAS engaged in blacklisting activities towards Plaintiff and HAS destroyed evidence of such (**emphasis added**).

c. Fact No. 3: Defendant has posted on the Internet **false information about Plaintiff of a blacklisting nature** from 2/6/98 to the present day for any inquisitive employer to see. This information is STILL available on the Internet as of 2/28/02. All one has to do to access this blacklisting type information about Plaintiff is to do a search for his name with an Internet Search Engine and this information becomes instantly available. In addition, the excerpt of the Federal Register, which Plaintiff has included within the Binder Tab 10, provides direction to three different sources where this information can be obtained about Plaintiff. E.g.: www.oha.doe.gov. What is found at this website is a four page Decision and Order of Defendant, Case No.VFA-0351 concerning Plaintiff's FOIA request. On page two of four it is stated: "In fact, AOO has informed us that Appellant [Plaintiff] has already engaged in

extreme verbal harassment of co-workers . . . see Record of Telephone Conversation between Dawn Goldstein and Ron O'Dowd (November 19, 1997)," **See Exhibit I**

The information quoted above that Defendant has posted about Plaintiff on the Internet is false, and it is of the result of Defendant's ex parte communication of "November 19, 1997". See the captioned Original Complaint at 4 which states:

> "20. Contained within this D & O (VFA - 0351) is evidence of *ex parte* communications made between Defendant's AOO and OHA with **knowingly false representations made about Plaintiff of a very public Blacklisting nature posted on the INTERNET.**
>
> 21. The Blacklisting comments, made by Mr. Ron O'Dowd of Defendant's AOO, are **still** available on the INTERNET to the very day of this instant Complaint for any inquisitive employer to see (emphasis added)."

Fed.R.Civ.P. 8(d) applies **again** here. Defendant does not respond or deny the averment above and therefore admits to this very public blacklisting of Plaintiff with a knowingly false representation.

III. CONCLUSION

Plaintiff has very solidly established, within Fact Nos. 1 through 3 above, that Defendant has engaged in blacklisting activities against him from

11/97 to the present day. By fact and law, Defendant has admitted to this without any doubt. The Supreme Court has ruled within *Sartor v. Arkansas National Gas Corp.*, 321 U.S. 620, 624 (1944) that: ". . . a summary disposition . . . should be on evidence which a jury would not be at liberty to disbelieve, and which would require a directed verdict for the moving party." See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-252 (1986). All that has been presented above has been firmly established as fact and has been fully briefed **prior** to this instant Motion. This Motion is therefore complete and ready for judgment upon filing.

Defendant was contacted and opposes this Motion.

PRAYER FOR RELIEF

Plaintiff prays that this Court will afford him his Fifth Amendment right of "equal protection of the laws" from the discrimination by Defendant by granting this instant Motion and issuing an Order noting the guilt of Defendant, and for proceeding before a Jury Trial for the determination of damages. Justifications for granting this Motion for Partial Summary Judgment have been thoroughly detailed above.

Dated: March 1st, 2002

Respectfully submitted,
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